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No. 508.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA,
Petitioner,

vs.

ERIE COAL AND COKE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT.

SUMMARY OF ARGUMENT.

I.

The filing of bond with the claim in abatement does not prevent the respondent's recovery:

(1) The bond does not constitute a waiver of the Statute because waiver is a matter of in-

tention and all the circumstances clearly negative any such intention. Among such circumstances are (a) the fact that at the time the bond was given the Statute of Limitations was generally conceded not to be applicable, (b) in this case there were two claims in abatement filed, the first without a bond, the second three years later accompanied by a bond, and when the second claim was filed the Statute had already run, and (c) the Statute which enacted the limitation provision, itself provided the method by which it could be waived, which method was not pursued in this case.

(2) The bond was filed for the sole purpose of security and of guaranteeing the collector against the possibility of the subsequent insolvency of the taxpayer. It was not the giving of the bond that delayed collection, but the filing of the claim in abatement; the bond was incidental, and the contemporary procedure clearly shows that the filing of a claim in abatement was just as effective in staying collection of the assessment, whether or not it was accompanied by a bond.

(3) The case of United States vs. John Barth Co., 279 U. S. 370, relied upon by the petitioner does not support the petitioner's contention.

II.

Even if Section 611 of the Revenue Act of 1928 is a valid enactment it was not intended to affect cases such as this, wherein payment was exacted not only after the Statute of Limitations had become a bar but after the liability itself had been extinguished by the express statutory provision of Section 1106 (a) of the Revenue Act of 1926.

(2) If Section 611 is construed so as to apply to a case such as this, it becomes unconstitutional because in conflict with the Fifth Amendment.

ARGUMENT.

I.

RESPONDENT IS NOT PRECLUDED FROM RECOVERING BY REASON OF HAVING EXECUTED A BOND CONDITIONED ON PAYMENT OF ANY PART OF THE 1917 TAX FOUND BY THE COMMISSIONER TO BE DUE.

1. *The Bond filed with the Claim in Abatement does not constitute a waiver of the Statute of Limitations.*

We have purposely used the word "waiver" in the above heading because if we correctly view this matter, it is the principle of waiver that is here involved. Counsel for the Petitioner in presenting their argument say that by the giving of its Bond, the Respondent "is precluded", or "is barred", or "is prevented" from using the bar of the Statute of Limitations in aid of its recovery. In order to be so "precluded," or "barred," or "prevented" either the doctrine of estoppel or voluntary waiver must operate. The necessary elements of an estoppel are of course not present so if the Respondent is precluded from raising the question of the Statute of Limitations, it was because it has voluntarily waived the benefit of its provisions.

In approaching this question, it is well to consider the situation as it was when this Bond was given; because waiver is very largely, if not entirely, a matter of intention, and such intention would be evidenced if at all at the time the act was done.

The tax here involved is a tax for the year 1917 and the assessment was made therefor in March, 1921. The limitation on collection was first enacted in

Section 250 (d) of the Revenue Act of 1921, 42 Stat. 227, as follows:

> "* * * And no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war-profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

From the time this Act was passed until the decision of this Court in the case of *Bowers vs. New York and Albany Lighterage Co.*, 273 U. S. 346, decided on February 21, 1927, it was practically universally believed that the collection of a tax by distraint was not a "suit or proceeding", under Section 250 (d) of the Revenue Act of 1921 and that therefore such collections were not affected by the statutory limitation of five years. As is stated in the Government's Brief in the case of *Graham and Foster vs. Goodcell* (now before this Court at No. 36):

> "* * * The Treasury Department held that taxes assessed within the five-year period could be collected by distraint at any time and that a suit in court was the only proceeding for collection that was barred after the five-year period. I. T. 1446 I-2, Cumulative Bulletin (July-Dec., 1922), p. 218. This being the position of the Treasury Department, the practice of delaying collection upon the filing of claims for abatement developed. Upon the filing of a claim for abatement the collection of any additional tax was deferred until the taxpayer could have a hearing and an opportunity to present facts in opposition to the assessment. In a great many cases this practice delayed the collection until after the five-year period had expired. On February 21, 1927,

this Court rendered its decision in Bowers v. N. Y. & Albany Co., *supra,* holding that collection by distraint was a 'proceeding' within the meaning of Section 250 (d) of the Revenue Act of 1921 and that such collection was barred thereby after five years. This case finally established that the view of the Treasury Department was erroneous and that a great many of the collections theretofore made had been barred."

The point we seek to make is this:

When the Bond in the present case was given, to-wit, on May 31, 1924, the idea of waiving the Statute of Limitations thereby, was not in the mind of anybody concerned because at that time it was generally conceded that the Statute was not applicable.

Again, as bearing on the question of the purpose and intent of this Bond, it is to be noted that in the present case there were two claims in abatement filed. The first was filed on May 4, 1921, and was not accompanied by Bond; this was before the Statute of Limitations had run, and it will not be contended that this had the effect of waiving the Statute. This first claim in abatement was rejected on March 15, 1924. The five year limitation on collection had expired in the interim. On May 31, 1924, a new claim in abatement was filed which was accompanied by the Bond in question. At this time, as above stated, the Statute had run and if, as we contend, the question of intent is material, we respectfully submit that no intent to waive the Statute can possibly be gathered from this course of conduct.

Still another reason why the Bond with the claim in abatement is not a waiver of the Statute of Limitations, is the fact that the Act itself, which estab-

lished the limitation, specifically provided how it could be waived. The provision is as follows:

> "Sec. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, *unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax;* * * *" (Italics ours.)

These consents in writing or waivers as they are called, were frequently employed, but no such consent in writing was entered into in the present case (R. 6). The Bond is obviously not the consent in writing referred to in the Statute. The Board of Tax Appeals has definitely so ruled in two cases, *C. B. Shaffer vs. Commissioner*, 12 B. T. A. 298, and *Gulf States Steel Company vs. Commissioner*, 12 B. T. A. 1244.

2. *The purpose of the Bond was a single purpose, viz: to insure to the collector the solvency of the taxpayer.*

It is to be remembered that this Bond was neither required nor authorized by any statutory provision.

Whether or not a Bond was required with a claim in abatement was a matter personal with the particular collector. He required a bond or not in accordance with his individual estimate of the financial reliability of the taxpayer. As the Board of Tax Appeals said in the *C. B. Shaffer* Case above stated, 12 B. T. A. 289, 301:

> "* * * We cannot escape the conclusion that the instrument is what it says it is, a bond, given to the collector of internal revenue to indemnify that collector if she should not be able to collect any amount held to be legally due and payable. Collectors of internal revenue receive from the Commissioner of Internal Revenue assessment lists against taxpayers in their districts. Upon the receipt of such a list, the collector becomes liable, personally, for the collection of the taxes shown. To emphasize that personal responsibility, the United States requires of each collector of internal revenue a bond, running to the United States, conditioned (in part) upon collection of the taxes shown upon the assessment lists received. If the taxes are uncollectible the collector may make a claim for credit of such amount and the approval of such claim relieves the collector of personal responsibility. * * * When the relation of the collector to the scheme of Federal taxation is kept in mind, it seems clear that the bond in this proceeding was taken by the collector to protect against personal responsibility, and was her own private affair. * * *."

The giving of a Bond therefore, had nothing to do with the Statute of Limitations, and perhaps what is more important, *the giving of a Bond was not what delayed the collection of the tax.* The filing of a claim

in abatement was just as effective for that purpose if no Bond accompanied it. We wish to stress this point because the position is taken in Petitioner's Brief, quoting from the *John Barth Company case*, 279 U. S. 370:

> "The taxpayer has obtained his object by the use of the Bond and he should not object to making good the contract by which reason he obtained the delay he sought."

In our case, the taxpayer did not obtain his object by the use of the Bond, and we repeat that under the practice that obtained, the filing of the claim in abatement was just as effective in delaying collection whether or not it was accompanied by a Bond. In this connection, we again refer to the Government's Brief in the Graham and Foster case (p. 10 *et seq.*), where it is argued that the filing of a claim for abatement, "with or without bond," *stayed* the collection of the tax so as to make Section 611 of the Revenue Act of 1928 applicable. The following excerpts from said Brief are enlightening:

> "* * * The Treasury Department held that taxes assesssed within the five-year period could be collected by distraint at anytime and that a suit in court was the only proceeding for collection that was barred after the five-year period. I. T. 1446 I-2, Cumulative Bulletin (July-Dec., 1922), p. 218. This being the position of the Treasury Department, the practice of delaying collection upon the filing of claims for abatement developed. *Upon the filing of a claim for abatement the collection of any additional tax was deferred* until the taxpayer could have a hearing and an opportunity to present facts in opposi-

tion to the assessment. In a great many cases this practice delayed the collection until after the five-year period had expired. * * *"

Quoting from the Report of the Committee on Ways and Means:

"Taxpayers were frequently permitted to file claims in abatement with the Collector *and thus delay* the collection until the claims in abatement could be acted upon * * *.

"The Ways and Means Committee Report, *infra*, p. 48, states, in part (p. 34):

"Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the Collector and *thus delay the collection* until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. (Italics ours.)

"The Report of the Finance Committee of the Senate, *infra*, p. 49, states, in part (p. 42):

"Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the *collection delayed* by the filing of a claim in abatement, * * *. (Italics ours.)"

Quoting from the opinion of the District Court in *Reeves vs. Anderson*, P. H. Tax Ser. Vol. I, 1930, par. 1383:

"* * * Section 611 of the Act of 1928, by its express terms, is applicable, irrespective of whether or not a bond accompanied the claim. Moreover, while the Act of 1918 was the only

statute prior to 1924 which made provision for a claim and formal stay, the Commissioner of Internal Revenue has had authority to abate or refund taxes illegally assessed throughout the period under review. See 26 U. S. C. A. Sec. 149, historical note. And pursuant to statutory authority, the Commissioner, with the approval of the Secretary of the Treasury (fol. 39), promulgated regulations which included provisions for the filing of claims in abatement. In none of them, however, was the execution of a bond required, or was there a mandatory provision that collection must be stayed pending decision on the claim in abatement. On the contrary, it was provided that the filing of a claim in abatement did not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized by the running of the statute or otherwise. See Article 261, Regulation 33; Article 1032, Regulation 45; Article 1032, Regulation 62; cf. *United States v. Burden, Smith & Co.* (C. C. A.), 33 F. (2d) 229, 230. Under these regulations the collector had authority to postpone the collection of the tax pending the determination of the claim for abatement, unless, in his judgment, such action would jeopardize the ultimate collection of the tax. Postponement was the common practice where there was no doubt as to the solvency of the taxpayer; in many cases the period of the statutory bar on collection expired before the decision on the claim in abatement had been rendered. * * *"

In view of this argument by which the Government supports its position with reference to Section 611, it is submitted that it cannot single out the Erie Coal and Coke Company and say that in its case, it was the filing of the Bond that delayed the collection of

the tax and not the claim in abatement. The fact of the matter is that the collection in this case would have been delayed to the same extent if this claim in abatement had been filed without a Bond and just as it had previously been delayed by the filing of the first claim in abatement in 1921.

3. *The case of United States vs. John Barth Company*, 279 U. S. 370, *does not support Petitioner's contention.*

We believe that Counsel for the Petitioner has misconstrued the decision of the Court in the Barth Company case, and we submit that that case is no authority here for the following reasons:

(a) The bond in the Barth case was required to be filed by the specific provisions of a particular Statute, which Statute likewise prescribed its effect.

The Section of the Act under consideration in the Barth case was Paragraph 14 (a), Sec. 234 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which provides:

> "At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss * * * resulting from any material reduction * * * of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. *In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond.* * * *"
> (Italics ours.)

This was the only Statutory provision relative to Bonds. In fact it was also the only Statutory provision relative to claims in abatement. Claims in abatement in general were permitted by departmental regulations only, and these regulations did not require the giving of a bond.

This Section of the 1918 Act then, deals with a very limited class of taxpayers, *i. e.*, those who had sustained a substantial loss resulting from any material reduction of the value of the inventory for 1917, or from actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In that limited class of cases, the Act specifically provided that the taxpayer should file a Bond with his Claim in Abatement, and that when this was done "payment of the amount of the tax covered by such claim shall not be required until the claim is decided."

We submit that all that the Court decided in the Barth case was that proceedings under Section 14 (a) aforesaid constituted an exception to the operation of the limitation of five years created by Section 250 (d) of the Revenue Act of 1921. After quoting Section 250 (d), the opinion proceeds:

> "Section 250 (d) refers to a failure of the Commissioner of Internal Revenue to pass upon the return made by the taxpayer and to assess the tax. It is the determination preceding the assessment that is referred to in that section. If there is no determination and assessment within five years after the return is made, or after the return should have been made, then the statute bars an assessment and the collection of the tax due. But section 250 (d) does not apply to the

> proceeding under paragraph 14 (a), which relates to a case in which there is a return with a resulting assessment, as there was here, and the taxpayer seeks to reduce the assessed tax by representing a claim for an abatement of part of it, and to avoid the collection of that part, pending action on the claim for abatement, by giving a bond. In this case there was a return and there was an assessment, but the bond was given well within the five years after the return, and when the bond was given it required the obligees, if the abatement was not allowed, to pay interest from the time such tax would have been due, had no such claim been filed. In other words, the limitation of section 250 (d) has no application to a situation following a claim of abatement and the giving of bond." (In accordance with the provisions of paragraph 14 (a).)

It is to be remembered in this connection that with reference to claims in abatement in general, the regulations provided,

> "the filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund." Art. 1032. Reg. 62.

The present case, therefore, presents a very different situation from that dealt with in the Barth case, where the Act of Congress specifically provided that when that particular type of claim in abatement was filed with the Bond, "payment shall not be required until the claim is decided."

(b) *In the Barth case the suit was on the Bond itself which the Court held was an independent undertaking.*

In the Barth case, the United States brought a common law action against the principal and surety on the Bond. With reference to this, the opinion of the Court is:

> "The plain purpose of paragraph 14 (a) was to affect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the Bond. * * * The making of the Bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had * * *"

In our case, there is no suit on the Bond, nor could there have been, because there was never any default under the Bond. Its condition was that certain payment would be made and when that payment was made, the Bond was automatically extinguished. The fact that the Bond had been given, however, did not enlarge nor diminish the tax liability. Its purpose, as we have endeavored to show, was merely to provide security for payment. It is the tax liability with which we are here concerned, and the question of whether or not this Bond created an enforceable obligation for a liability independent of the tax liability, is not involved. Even if this were a suit on the Bond, our contention would be that there was no liability. The condition of the Bond is, "if the principal shall * * * pay any part of *such tax* found by the Commissioner of Internal Revenue to be due", etc. After the enactment of 1106 (a) of the Revenue Act of 1926, there was no *such tax*. Any

tax that may have previously existed, was by that Act completely extinguished and, consequently, any finding by the Commissioner that such a tax was due, was a nullity. (The Revenue Act of 1926 became a law on February 26, 1926, and the finding of the Commissioner in this case was made on March 31, 1926.) However, as stated above, this question is not involved. This is not a suit on the Bond. It is a suit to recover a payment illegally exacted *as a tax liability* when no liability existed—a payment exacted under threat of distraint, (R. 5) and which would have been exacted in just the same fashion if there had been no Bond. We respectfully submit that the decision in the John Barth Company case does not support the Petitioner's contention.

For a similar reason the decision of the Court of Claims in the case of *Mascot Oil Company vs. United States*, 47 F. 2nd 309, is distinguishable. In that case, instead of a bond, the taxpayer deposited the money in a bank in escrow which, as far as the taxpayer was concerned, was tantamount to actual payment. The other feature that distinguishes that case from this, will be noted in the following from the Opinion:

> "* * * The collection was not made on the ground that a tax was due, but was based on a valid contract to pay a certain amount when it was determined by the commissioner. The tax fixed the sum to be paid, but the payment and collection was by virtue of the contract and not by reason of the tax liability, and the payment therefore cannot be recovered by plaintiff * * *."

II.

SECTION 611 OF THE REVENUE ACT OF 1928 DOES NOT PRECLUDE RECOVERY.

(a) Section 611 Does Not Apply to Taxes Collected After the Running of the Statute of Limitations, and During the Time Section 1106 (a) of the Revenue Act of 1926 was in Force.

When the payment of $65,706.07 was exacted by plaintiff from defendant on April 20, 1926, under the guise of additional income and excess profits taxes for the year 1917, collection was barred by the existing statute of limitations, and, furthermore, no liability of any kind running to the Government against the plaintiff on account of 1917 income and excess profits taxes existed in view of the provisions of Section 1106 (a) of the Revenue Act of 1926 then in force. That section of the law, which was enacted February 26, 1926, provided that the bar of the statute of limitations against the United States *should not only operate to bar the remedy, but should extinguish the liability.* When the collection was made, therefore, not only was the Collector without authority to collect, but any liability that may have existed had been completely extinguished.

Section 611 of the Revenue Act of 1928 provides that certain payments made under conditions described therein shall not be considered as overpayments under the provisions of Section 607, relating to payments made after the expiration of the period of limitations. The title of Section 607 is "Effect of Expiration of Period of Limitations against the United States", and it provides that any tax assessed

or paid after the expiration of the period of limitations properly applicable thereto shall be considered an overpayment, and shall be credited or refunded if claim therefor is filed within the period of limitation for filing such claim.

It will be observed that Section 611 prescribes the following requisites to bring a case within its terms:

(1) Assessment of an internal revenue tax within the period of limitation properly applicable, and prior to June 2, 1924.
(2) Claim in abatement.
(3) Stay of collection, and
(4) Payment of such part as may have been stayed before or within one year after the enactment of the 1928 Act.

At the time of the enactment of that law there were two classes of taxpayers who might be affected by the enforcement of this section. The difference between the classes is due to difference in the time of the payment mentioned in the requisite numbered (4) in the preceding paragraph. These classes may be described as follows:

(1) Those who made payments after the running of the statute of limitations, and prior to the enactment of the Revenue Act of 1926.
(2) Those who made payments after the running of the statute of limitations, while the Revenue Act of 1926 was in effect.

It might seem from the language of Section 611 that there is a third class, *i. e.*, those who made payments after the running of the statute of limitations within one year after the enactment of the Revenue Act of 1928. But Congress deliberately refused to

authorize such collections, (See Report of Conference Committee, *Infra*, p. 39, and statement of Representative Garner, *Infra*, p. 40), and in a public announcement issued on July 27, 1928, Mimeograph 3660, VII-2C. B., page 82, by Acting Commissioner H. F. Mires, it was stated that Sections 607 and 611 do not authorize the Bureau to enforce collection of a tax in any case after the expiration of the period of limitation, but merely prescribe the effect of the period of limitation against the United States upon any assessment or payment made after the expiration of the period of limitation applicable thereto. This one year provision was obviously left in Section 611 purely through oversight. At any rate it is admittedly inoperative because collection cannot be enforced from the class to which it refers.

The second class referred to above are in a different situation from those in the first class, because their payments were made at a time when, by express statutory enactment contained in Section 1106 (a) of the Revenue Act of 1926, all liability was extinguished. That section was more than a statute of limitations. In any case to which it properly applied it completely extinguished any liability that may have existed, and rendered null and void any assessment previously made by the Commissioner. *The situation was as if no liability had ever existed.*

A payment which otherwise meets the requisites of Section 611, made while the 1926 Act was in force, is not merely a payment made after the running of the statute of limitations; it is not merely a payment made when there was a liability against the taxpayer running to the Government which the Commissioner and Collector could not enforce because of the ex-

piration of the period of limitations; it is a payment made when by express statutory provision there was no liability whatever. It seems reasonable to conclude, therefore, that Congress, in enacting Sections 607 and 611, *which by their terms refer only to payments made after the running of the statute of limitations*, did not intend to include payments made which Section 1106 (a) of the Revenue Act of 1926 was in force.

The language of the report of the Ways and Means Committee of the House (page 49 of Respondent's Brief in the Graham and Foster case No. 36) clearly shows that the intent of the provisions under discussion was merely to withdraw the defense of the statute of limitations and not to re-create a dead liability. The report states, *inter alia*:

> "Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the tax-payers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, *and merely withdraws the defense of the statute of limitations.*

The adjudicated cases involving the narrow question present in the instant case are few. On some of the questions involved in the cases now before your Honorable Court, for instance the meaning of the word "stay", and whether or not Section 611 applies to a common law suit against a collector, the decisions of the lower courts are not in accord. These questions have been presented in the other cases and we shall not re-argue them here. There is no lack of accord, however, with respect to the narrower ques-

tion presented by this case and by the Wyman Partridge Company case No. 416. In all the other cases with the exception of these two the payment by the tax-payer had been made prior to February 26, 1926, the effective date of the 1926 Act. That being so, in each of those cases at the time payment was made *the liability still existed although collection was barred by the statute of limitations.* In the case at Bar payment was made on April 20, 1926, *at which time no liability of any sort existed*, the liability, if any, having been extinguished by Section 1106(a) of the Revenue Act of 1926. This we submit presents a very different situation and a situation that is not now before this Court in any of the other cases except the Wyman Partridge Company case.

In every case in which the lower courts have dealt with situations where the liability had been extinguished by Section 1106(a) of the Revenue Act of 1926 the decisions have sustained the position upon which we here rely, namely, that Section 611 does not affect those cases and that the retroactive repeal of Section 1106(a) does not and cannot re-create the debt liability.

Clinton Iron & Steel Co. v. Heiner, 30 F. (2nd) 542 (W. D. Pa.)

Pepsin Syrup Co. v. Schwaner, 35 F. (2nd) 197 (S. D. Ill.)

Diamond Alkali Co. v. Heiner, 39 F. (2nd) 643 (W. D. Pa.)

Dobbins v. Commissioner, 31 F. (2nd) 935 (C. C. A. 3rd)

U. S. V. Wyman Partridge Co., 41 F. (2nd) 886 (Ct. Cls.)

Southern Lumber Co. v. U. S., (W. D. Ark. Rep.

in Prentice Hall, Fed. Tax Service 1930, Vol. 1, Section 1836).

Wettengel v. Robinson, 300 Pa. 355.

In the *Clinton Iron & Steel Company* case the Court said (pp. 544-545):

> "Congress may, under certain circumstances, ratify an erroneous collection of tax retroactively. *United States v. Heinszen & Co.*, 206 U. S. 370, 27 S. Ct. 742, 51 L. Ed. 1098, 11 Ann. Cas. 688; *Rafferty v. Smith, Bell & Co.*, 257 U. S. 226, 42 S. Ct. 71, 66 L. Ed. 208. The situation in the case at bar, however, is not that of the cases cited. In the instant case the tax was collected by the defendant, as collector of internal revenue, at a time when existing statutory law declared that not only was the right of collection barred, but that the liability had been extinguished. * * * If it (Section 611) has any retroactive force, it is in respect to a demand upon the United States for the return of an amount voluntarily paid, and not in connection with a personal suit theretofore brought against a collector of internal revenue to recover an amount paid under duress at a time when no legal liability existed on the part of the taxpayer."

In the Pepsin Syrup case, the Court said (p. 8691):

> "The tax here sought to be recovered and the right to recover it was barred by Section 1106 (a) of the Revenue Act of 1926 before it was paid under duress by the taxpayer. That statute not only barred the remedy but extinguished the obligation of the taxpayer to pay. The fact that Section 612 of the Revenue Act of 1928 repealed Section 1106 (a) of the Revenue Act of 1926 'as of the date of its enactment' is of no avail to defendants in this case. It was not within the power

of Congress to enact legislation to recreate the liability extinguished by the operation of Section 1106 (a), *supra*. *United States v. John Barth Co.*, 27 Fed. (2d) 782-784; *United States v. John Barth Co.*, 279 U. S. 370 (49 S. Ct. 366, at D-9230, herein); *William Danzer & Co. Inc. v. Gulf & Ship Island R. R. Co.*, 266 U. S. 635; 17 R. C. L. 674."

In the Dobbins case, the Court said (p. 937):

"Section 1106 of the act of 1926 (26 USCA 1249, note) provides that the bar of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability. Therefore, if the United States did have a just claim against Emily M. Dobbins in respect of any tax before the statute ran against it, the liability was absolutely extinguished in 1926 when the United States was seeking to recover it and the repeal of the section by the act of 1928 (45 Stat. 874) did not revive a dead liability or create a new obligation."

In the case of *Southern Lumber Company vs. U. S.*, the Court said:

"Section 612 of the Revenue Act of 1928 attempts to repeal Section 1106 (a) of the Revenue Act of 1926, as of its effective date. After the passage of Revenue Act of 1926 and before the passage of the Revenue Act of 1928, the plaintiff paid the taxes in question. Its rights accrued as of the date of payment. Section 1106 (a) plainly extinguishes the liability by positive enactment; and collection was had when the obligation no longer existed in law. Not only had the remedial statute of limitations expired, but the very essence of the obligation was destroyed. The at-

tempt of Section 612 of the Revenue Act of 1928 to revive claims already barred and extinguished would unconstitutionally deprive the taxpayer of property without due process of law. Congress has no power to re-create a liability once extinguished. United States v. Barth, 27 F. (2d) 782 (this question not passed on by the Supreme Court in United States v. Barth, 279 U.-S. 370); Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197. In Danzer v. Gulf R. R., 268 U. S. 633, the Supreme Court said:

> 'Where under the Interstate Commerce Act, the lapse of time for presenting claims against railroads to the Interstate Commerce Commission not only bars the remedy, but destroys defendant's liability, the giving of the provision of the Transportation Act that the period of Federal Control should not be computed as a part of the limitation period a retroactive effect, so as to revive claims already barred, would unconstitutionally deprive defendant of property without due process of law.' "

The case of *Wettengel v. Robinson*, 300 Pa., 355, was decided by the Supreme Court of Pennsylvania on May 12, 1930. The question arose in the State Courts because the United States had presented a tax claim against a Pennsylvania Corporation which was in the hands of statutory liquidators. With regard to the question here involved that Court said:

> "To meet this difficulty (the effect of Sec. 1106 (a) of the Revenue Act of 1926) the government points to section 612 of the Revenue Act of May 29, 1928, which provides that 'Section 1106 (a) of the Revenue Act of 1926, is repealed as of February 26, 1926,' that is, as of the date of its passage. Undoubtedly that provision would be effec-

tive as to all taxes the liability for which had not been extinguished prior to the passage of the Act of 1928, but would it as to those where it had? The court below, relying on Dobbins v. Commissioner of Internal Revenue, 31 Fed. (2d) 935, decided it would not. In construing section 612, it was there said that it 'did not revive a dead liability or create a new obligation.' The same conclusion was reached in United States v. John Barth Co., 27 Fed. (2d) 782; Erie Coal & Coke Co. v. Heiner, 33 Fed. (2d) 135, and Pepsin Syrup Co. v. Schwaner, 35 Fed. (2d) 197. True, the first of these cases was reversed in United States v. John Barth Co., 279 U. S. 370, but the Supreme Court expressly refused to pass upon the government's contention that the Act of 1928 'restores and gives life to the tax retrospectively.' A search fails to disclose any opinion by the Supreme Court of the United States, or by any federal circuit court of appeals, which reaches a different conclusion from that of the court below. Campbell v. Holt, 115 U. S. 620, relied on by the government, decides simply that a statute which limits the time within which suit may be brought, may be repealed, although, in the particular case under consideration, the statutory limitation had run before the repealing statute was passed. Its effect as a precedent has been limited, however, to cases where the repealed statute was purely one of limitation. On this point see William Danzer & Co. v. Gulf and Ship Island R. R. Co., 268 U. S. 633, where Campbell v. Holt is distinguished, and it is held that if a statute both creates the liability and limits the time within which suit may be brought, the limitation cannot be repealed after the right to sue has been lost, because (page 637) the 'effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment.'

It is not necessary to consider this point fur-

ther, for we are clearly of opinion that another principle of law stands as an effectual bar to the government's claim. The provision quoted from section 612 of the Act of 1928, is retrospective, but the important question is as to the extent thereof. In Union Pacific R. R. Co. v. Laramie Stockyards Co., 231 U. S. 190, 199, it is said: 'The first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature" '. This rule must be of at least equal application when determining the scope of legislation admittedly retrospective in some degree. The justice is not less obvious in such cases, and hence a statute 'which interferes with antecedent rights (must fail in its attempted application to a particular case, unless the language used shows that such was) the manifest intention of the legislature.' No such language appears here. There is not the slightest hint of an intention to reopen cases like the present, where the liability had been wholly extinguished. On the contrary, as the government's brief advises us, the expressed reason, appearing in the report of both the 'senate and house committees proposing the 1928 Revenue Act,' was because 'Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax, or for

> the making of a refund or credit, or the bringing of a suit for refund.' The utmost effect which can be given to that reason,— and it is the only one of which we have been advised,—is that when making settlements in the future the government shall not be hampered by the 'doubtful questions' which bothered it in the past. Certainly it cannot justly be construed to give life to the taxes we are now considering, which were irrecoverable before even the Act of 1926 was passed."

On reason and authority, therefore, we are entirely justified in concluding that Section 611 of the Revenue Act of 1928 cannot be construed as attempting to include within its provisions those cases wherein payment was exacted *after* liability was extinguished by Section 1106 (a) of the Revenue Act of 1926 and while that Act was in effect.

This construction does not necessitate declaring Sections 611 and 612 of the Revenue Act of 1928 unconstitutional and is, therefore, consistent with the rule of construction that requires a statute to be construed so as to avoid unconstitutionality if at all possible.

(b) Section 611 is not a Retroactive Ratification of an Illegal Collection, Nor a Re-Levy of an Extinguished Tax Liability.

The petitioner must, of course, concede that there is no language in the 1928 Act which expressly ratifies an illegal collection. If the provisions under consideration are to be construed as a retroactive ratification of an illegal collection it must be because such a meaning is implied from the language used. We submit, however, that there is nothing in the provisions

from which such an implication could be drawn, and the legislative history which petitioner has set forth in its brief indicates no such purpose.

In the report of the Ways and Means Committee the following appears:

> "Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that *the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations.* If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment."

Obviously this statement could not apply to payments made while Section 1106 (a) of the Act of 1926 was in force because that section expressly extinguished all liability. A payment exacted when there was not the slightest semblance of a liability cannot be regarded as an amount properly due and the statement that these provisions merely withdrew the defense of the statute of limitations, obviously, could not be applied to a situation such as presented in this case.

It is recognized that Congress may, under certain circumstances, levy a tax retroactively. This Court has so held in *United States v. Heinszen & Company*, 206 U. S. 370, 27 S. Ct. 742; *Rafferty v. Smith, Bell & Company*, 257 U. S. 226.

The situation presented to the Court in those cases,

however, is clearly distinguishable from that existing in the case at bar. There collections were made under a defective law which Congress later specifically ratified and legalized. Those cases had to do with tariff duties which had been collected in the Philippine Islands by virtue of Presidential Proclamation which was later held not to be sufficient authority. Congress then passed an act which provided:

> "That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eight, nineteen hundred and two * * * are hereby legalized and ratified, and the collection of all such duties prior to March eight, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed."

The Court held that since Congress had the power to authorize or impose the tax originally it could ratify an erroneous collection, and there is no question of the soundness of that decision.

In the present case, however, Congress has not undertaken to ratify an erroneous collection. The language of the statute cited above from the Heinszen case clearly demonstrates that when Congress undertakes to ratify an erroneous collection of tax it does so in no uncertain language, and it has certainly not done so in Section 611 of the Revenue Act of 1928.

Furthermore, it must not be forgotten that we have here a case of a collection made when any liability that may have existed had *by express statutory declaration been extinguished.* If it had been the intent

of Congress to recreate this liability by re-levying the tax would it not be reasonable to expect the statute to commence with, "There is hereby levied a tax * * *", or some other equally appropriate language?

We submit that the levying of a tax by inference is an unheard of proposition, but that is precisely where petitioner's argument leads.

(c) Section 611 is not the Withdrawal of a Privilege Previously Granted Which Permitted the Sovereign as a Matter of Grace to be Sued.

In the first place this is not a suit against the sovereign but is an action against an individual. It is an action for money had and received and is of common law origin; Elliott v. Swartwout, 10 Peters, 137; Bend v. Hoyt, 13 Peters, 263.

Counsel for petitioner contends that it is no longer a common law action but that the common law action has inferentially been superseded and that the same type of action is now inferentially statutory. Passing this argument for the moment and assuming that this is so, the fact remains that this right of action against a Collector has existed substantially since the beginning of the Government, and if it had been the purpose of Congress to take it away or restrict it in any respect, we should naturally expect that purpose to be expressed. Of course, no such purpose is expressed nor even remotely suggested by Section 611 and 612 of the Revenue Act of 1928.

A history of the statutory enactments may be of some benefit in this connection:

Unquestionably the right of a citizen to sue a collector of internal revenue for duties illegally exacted from him is of common law origin. The form of the

action was assumpsit for money had and received. The principle of law upon which the action was based is that applicable to agents in private transactions, that is, that a voluntary payment to an agent without notice or objection will not subject the agent who shall have paid over to his principal to any responsibility, but that payment accompanied by notice or with protest against the illegality of the demand, does create a liability on the part of the agent who shall pay over to his principal in spite of such notice or protest. *Elliott v. Swartwout*, 10 Peters 137; *Bend v. Hoyt*, 13 Peters 263.

Prior to 1833 the action had to be instituted in a State court, the Federal courts being without jurisdiction in such cases except where the parties were citizens of different states and the requisite jurisdictional amount was involved. The act of March 2, 1833, ch. 57 (4 Stat. 633) permitted an original action against the collector in the Federal courts, and also permitted a collector sued in a State court to have the case removed to the Federal court.

Most of the litigation respecting illegal collections before the Civil War period had to do with customs, there being only two periods when internal revenue laws were in force, viz., from 1792 to 1802 and from 1813 to 1817.

Under the exigencies created by the Civil War a number of internal revenue laws were enacted, and it became a question whether the general provisions of the Act of 1833, giving jurisdiction to the Federal Courts of cases under revenue laws, extended to cases under the new enactments. This question was resolved by the internal revenue act of June 30, 1864, ch. 172 sec. 50, (13 Stat. 241) which provided that the

provisions of the Act of 1833 should extend to all cases arising under the laws for the collection of internal duties.

The Act of July 13, 1866, Sec. 68, (14 Stat. 172) however, repealed the fiftieth section of the Act of June 30, 1864, and had the effect of restoring the pre-existing situation with respect to personal suits against collectors for recovery of internal taxes, that is, the Federal courts had original jurisdiction only on the ground of diversity of citizenship and where the requisite jurisdictional amount was involved, and it was necessary to resort to the old practice of starting the action in a State court, subject to the right of the collector to remove the case to a Federal court under Section 643, Revised Statutes. See *Cincinnati Brewing Co. v. Bettman*, 102 Fed. 16, citing *Ins. Co. v. Ritchie*, 5 Wall. 541; 18 L. ed. 540; *City of Philadelphia v. Collector*, 5 Wall. 720, 18 L. ed. 614; *Collector v. Hubbard*, 79 U. S. 8, 20 L. ed. 272; *Vinal v. Improvement Co.*, 34 Fed. 228; *Crawford v. Hubbell*, 89 Fed. 1.

The Judicial Code enacted by the Act of March 3, 1911, ch. 231, 36 Stat. 1087, provided in Section 24, paragraph fifth, that the district courts should have original jurisdiction of all cases arising under any law providing for internal revenue, thus restoring the right of action against collectors in the District Courts.

The Act of March 3, 1887, known as the Tucker Act, Ch. 359, 24 Stat. 505, vested the Court of Claims with jurisdiction over suits against the United States founded on claims arising under any law of Congress, except for pensions, and the district and circuit courts were given concurrent jurisdiction of such claims not

exceeding $10,000.00. By Section 1310 of the Revenue Act of 1921 and Section 1310 of the Revenue Act of 1924, the jurisdiction of the district and Circuit Courts was enlarged to include suits against the United States for the recovery of internal revenue taxes, even if the claim exceeds $10,000.00, where the Collector by whom such taxes were collected is dead or out of office at the time the suit or proceeding is commenced.

These provisions authorizing suits against the United States are supplementary to the right of the taxpayer to pursue his remedy against the Collector, which remedy never was specifically granted by statutory enactment.

The common law action against the collector was modified by the Act of March 3, 1863, Ch. 76, Sec. 12 (12 Stat. 741), which became Section 989 R. S. and is now Section 842, Title 28 United States Code. This section provides that no execution shall issue against the Collector or other officer, but the amount recovered shall upon final judgment be provided for and paid out of the proper appropriation of the Treasury, if the Court certifies that there was probable cause for the act done, or that he acted under the directions of the Secretary of the Treasury, or other officer of the Government. It was further modified by the Act of July 13, 1866, Ch. 184, Sec. 19 (14 Stat. 152) which later became Section 3226 R. S. and is now Section 156, Title 26 United States Code. This law required that before bringing such an action a claim for refund should be filed with the Collector of Internal Revenue.

Despite the alterations in the common law remedy, the action is nevertheless still regarded as a personal

one, and it is in no sense an action against the United States. This was definitely held by the Court in *Sage v. United States,* 250 U. S. 33.

The personal nature of the action was again recognized by the Supreme Court in *Smietanka v. Indiana Steel Company,* 257 U. S. 1. In that case the court held that a suit to recover taxes cannot be maintained against the successor to the Collector to whom the taxes were paid. Other cases to the same effect are *Roberts v. Lowe,* 236 Fed. 604; *Philadelphia, etc. v. Lederer,* 242 Fed. 492; *Detroit Hotel Company v. Brady,* 275 Fed. 995.

In the case of *Smietanka v. Indiana Steel Company,* cited above, the Court said:

> "To show that the action still is personal, as laid down in *Sage v. United States,* 250 U. S. 33, 37, 39 Sup. Ct. 415, 63 L. Ed. 828, it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case."

From the foregoing it is apparent that the system of corrective justice by which a taxpayer has a right of action against a Collector of Internal Revenue for the recovery of an internal revenue tax erroneously or illegally exacted, and by which a judgment recovered by him may in effect be converted into a judgment against the United States if the Court issues a certificate of probable cause has been in operation for more than half a century. The petitioner contends that by Sections 607 and 611 Congress amended or modified the various provisions of law which make up this corrective system so as to preclude the re-

covery in this case. There is, however, no repeal or modification of these provisions by express reference, and if Sections 607 and 611 do repeal the long standing provisions of law upon which this system is based, it must be because these sections, when read with the earlier laws, are found to be so repugnant that the conclusion is unavoidable that Congress intended to modify or repeal the earlier law. There is no express reference to any provision of the Judicial Code respecting suits against Collectors of Internal Revenue, nor to Section 989 R. S. by which it is provided that if the Court issues a certificate of probable cause the amount recovered, shall upon final judgment, be paid out of the proper appropriation of the Treasury. If Congress had intended to modify these sections it seems reasonable to infer that it would have used some definite language indicating such an intent.

We, therefore, conclude that Section 611 was not intended to be the withdrawal by the sovereign of its consent to be sued.

Furthermore, even if this provision could possibly be construed as a withdrawal by the sovereign of its consent to be sued it could not properly be construed as a withdrawal of such consent in respect to payments exacted after the enactment of Section 1106 (a) of the Revenue Act of 1926. In this respect the argument hereinbefore made under point II (a) is equally applicable here.

(d) As construed by the Government, Section 611 is unconstitutional.

We have, in the foregoing, set forth the grounds upon which we rely to support our contention that

the provisions of the Revenue Act of 1928 were not intended to and do not apply to this case. If we are correct in this position, the question of constitutionality does not arise, but assuming, without admitting, that these provisions were intended to apply to this case, we are met at once with the question, did Congress have the power under the Constitution to enact these provisions.

This question has been answered in the negative in the following cases hereinbefore cited, (p. 20):

Clinton Iron & Steel Co. vs. Heiner, 30 F. (2nd) 542 (W. D. Pa.).
Pepsin Syrup Co. vs. Schwaner, 35 F. (2nd) 197 (S. D. Ill.).
Diamond Alkali Co. vs. Heiner, 39 F. (2nd) 643 (W. D. Pa.).
Dobbins vs. Commissioner, 31 F. (2nd) 935 (C. C. A. 3rd).
U. S. vs. Wyman Partridge Co., 41 F. (2nd) 886 (Ct. Cls.).
Southern Lumber Co. vs. U. S., (W. D. Ark.) Report in Prentice Hall, Fed. Tax Service 1930, Vol. 1, Sec. 1836.
Wettengel vs. Robinson, 300 Pa. 355.

Counsel for the Government state in their Brief, in the Wyman Partridge Co. case, that although the power of Congress to affect rights between individuals is limited by the Fifth Amendment, there is no such limit regarding claims against the Sovereign. We beg to call attention to the fact that this Court has expressly recognized that a retroactive tax law may be so arbitrary and capricious as to offend the fifth amendment. In *Nichols v. Coolidge*, 274 U. S. 531, the Court held that Section 402 of the Revenue

Act of 1918, so far as it required that there should be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after death, was arbitrary, capricious and amounted to confiscation, and, therefore, was unconstitutional. In the opinion in that case, by Mr. Justice McReynolds, it was said:

> "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. Union Pacific R. R.*, 240 U. S. 1, 24, 36 S. Ct. 236, 60 L. Ed. 493; L. R. A. 1917 D. 414; Ann. Cas. 1917 B. 713; *Barclay & Co. v. Edwards*, 267 U. S. 442, 450, 45 S. Ct. 135, 348, 69 L. Ed. 703. See also *Knowlton v. Moore*, 178 U. S. 41, 77, 20 S. Ct. 747, 44 L. Ed. 969."

Let us examine the facts in the present case and see if the application of the provisions of the Revenue Act of 1928, considered as an enactment imposing a tax on the affected persons, or, what amounts to the same thing, as a law ratifying an illegal collection, is so arbitrary and discriminatory as to amount to confiscation of vested property of the affected persons, contrary to the fifth amendment.

In the case at bar the statutory period for collection of additional taxes for 1917 expired not later than June 11, 1923. While there is good authority for the view that the running of the bar of the statute of limitations in itself extinguishes the liability, we may concede that it did not do so. It may be admitted that the law imposing the tax did not make

liability to the tax conditional upon assessment and collection within the statutory period, and that the expiration of the statute of limitations did not discharge the liability. In the Revenue Act of 1926, however, Congress by express declaration contained in Section 1106 (a) extinguished all liability. The situation was as if no tax had ever been imposed. The affected taxpayer was no longer to be considered as delinquent in payment of a liability running to the Government. He was in the eye of the law no different from any taxpayer who paid his tax in full. So far as Federal taxation was concerned he was entitled to rest secure in his right to hold and retain all of his property, subject only to the power of Congress subsequently to enact a valid taxing statute applying to all citizens without discrimination.

If the provisions of the Revenue Act of 1928 are viewed as an imposition of a tax on the affected persons, it is arbitrary, discriminatory and capricious and amounts to confiscation of the property of the affected persons contrary to the Fifth Amendment. As applied to the plaintiff it represents a tax on income and profits realized in the calendar year 1917. More than ten years elapsed between the transactions taxed, and the imposition of the tax. While the Court has, in some instances, recognized retroactive income tax laws as valid, it has never passed on a case where the law attempted to base a tax on transactions that took place ten years before the attempted levy.

There is another reason why this legislation is so discriminatory and its classification so arbitrary as to render it unconstitutional, and this particular

reason has not been mentioned in the adjudicated cases; it becomes apparent when the legislative history is examined. This legislative history shows that when the 1928 Act was being considered, Congress was confronted with this situation, brought to a head by the decision of the Supreme Court in the New York & Albany Lighterage case: Taxes imposed under prior revenue acts, totalling approximately $100,000,000. were barred by the statutes of limitations. Of this total amount $30,000,000. had been collected unlawfully and $70,000,000. still remained uncollected. This was the only difference between the persons affected. Those who had paid were seeking refunds and those who had not paid were resisting payment. Under the bill as first drafted the $30,000,000 already collected was to be kept and the $70,000,000 was to be collected in the future. The legislative history then shows that the Senate had stricken Section 611 as originally drawn from the bill, that in conference the House conferees endeavored to get the Senate to recede, and that a compromise was reached, by which the provision authorizing the collection of the $70,000,000.00 was omitted from the bill, there being some doubt about its constitutionality, and that the provisions retaining the $30,000,000.00 already collected was agreed to. The discrimination is obvious. A tax was to be imposed on certain persons who had paid, and others who had been successful in postponing collection were not to be taxed. Has Congress the power, under the guise of a law taxing income, to so discriminate between classes of citizens? It is submitted that the effect of this legislation, if it be considered as the retroactive imposition of a tax, is precisely

the same as though Congress had said, "A tax is hereby imposed on the $30,000,000 class. The $70,000,000 class is excused." If this does not constitute discrimination, it is difficult to imagine a situation that does.

The legislative history will be found in the appendix to the Government's Brief in the Graham and Foster case, No. 36 (pp. 45 to 51).

House Report No. 2, 70th Congress, 1st Session, Ways and Means Committee Report reads:

> "SEC. 611. COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.
>
> "Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. *Accordingly, it is of utmost importance to provide that the payments already made*

should not be refunded. In order to prevent inequality it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act."

The Senate Committee refused to agree and the following report shows the compromise reached:

"STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE.

"Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid it could be collected by distraint or proceedings in court begun within one year after the enactment of the new law. *The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection.*"

The figures above given are taken from the following quotation from the Appellant's Brief in this case in the Circuit Court of Appeals:

"Section 611 of the new Act, as proposed by the House of Representatives, went further than

the Section in the Act as finally passed by Congress. An explanation in dollars and cents of the effect of the Section, as originally proposed, and also as finally enacted, appears in the debates in the House of Representatives in a statement by the ranking Democratic member of the Ways and Means Committee, Mr. Garner, of Texas (Congressional Record, Volume 69, page 10136), as follows:

"* * * It meant $30,000,000 refund of taxes and $70,000,000 to be collected in the future from taxpayers. That was the basis of the $100,000,000 loss. When we got into conference we could not get the Senate to recede. We finally tied up on two questions—the furniture outfit and 611. I believe in telling how we do these things. We tied up on them. We wanted the Senate to recede from both, but they did not want to recede because some particularly selfish people were going to get the money. We do not believe in that, but the Senate does. The result is that we compromised. We made it 'original,' and then we struck out subsection (b) of section 611, cutting out the $70,000,000 prospectively we were going to get, because there was some doubt about the constitutionality of it, and decided to keep the $30,000,000 that we had in the Treasury. That was the compromise between those two amendments, one of them cutting down and the other giving up the prospect of securing $70,000,000 in the future."

By this legislation then as finally enacted, Congress has undertaken to classify citizens standing in the same relation to the Government as taxpayers, and has penalized those who had already paid and exempted those who had not paid.

In *Blodgett v. Holden*, decided November 21, 1927,

and modified February 20, 1928 (275 U. S. 142, 276 U. S. 594), the Court had before it questions certified to it by the Circuit Court of Appeals for the Sixth Circuit, one of which related to the application of the Revenue Act of 1924 to gifts fully consummated before it was enacted.

An equal division of opinion among the eight justices who heard and considered the matter rendered it impossible categorically to answer the question certified, but it was announced per curiam that the statements of views by the Justices are enough to show that the tax exacted cannot be sustained.

In the statement by Mr. Justice McReynolds, in which the Chief Justice, Mr. Justice Van Devanter and Mr. Justice Butler concurred, it was said:

> "We must therefore determine whether Congress had power to impose a charge upon the donor because of gifts fully consummated before such provisions came before it. 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184.
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> "In *Nichols v. Coolidge* (May 31, 1926), this court pointed out that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment. As to the gifts which Blodgett made during January, 1924, we think the challenged enactment is arbitrary and for that reason invalid. It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing.
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> * * * * * * * *

> "So far as the Revenue Act of 1924 undertakes to impose a tax because of the gifts made during January, 1924, it is arbitrary and invalid under the due process clause of the Fifth Amendment."

In the statement by Mr. Justice Holmes, in which Mr. Justice Brandeis, Mr. Justice Sanford and Mr. Justice Stone concurred, it was held, after stating the settled rule that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, the duty of the Court is to adopt that which will save the Act, that the Act was meant to operate only from its date and only to tax gifts thereafter made. It is significant, however, that the following statement was made:

> "If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. If I am right, we should read it in that way now."

The above statement is authority for the contention that we have heretofore made, namely, that as far as the present case is concerned, this Act can properly be construed to prevent its being declared unconstitutional. However, if it be construed to apply to the instant case, we confidently assert in view of the above, that the classification attempted to be made by the Act is so unreasonable, arbitrary and capricious as to offend against the provisions of the Fifth Amendment.

It is conceded that Congress has the power to grant certain exemptions in income tax laws, such as the exemption of incomes of single persons of less than $1,500 or incomes of husband and wife of less than $3,500, but such exemptions, to be valid, must be uniform. If the effect is to arbitrarily classify taxpayers occupying the same relation to the Government, and to tax one group and exempt the other, the law is not a valid exercise of the taxing power, and amounts to a confiscation without due process of law. That is the effect of the sections of the Revenue Act of 1928, if construed as imposing a tax on the affected persons or as ratifying an illegal collection. They divide persons occupying the same relation to the Government with respect to taxes imposed by prior revenue laws into classes, arbitrarily determined according to whether or not a payment has been made, and as construed by the Government, provide that one group shall be taxed, and the other exempted.

Whether the enactment of Sections 611 and 612 be considered as a retroactive imposition of a tax or the ratification of an unlawful collection, the conclusion is unavoidable that in order to accomplish the purpose contended for Congress had to recreate a dead liability. That this cannot be done is amply demonstrated by the case of *Danzer v. Gulf & Ship Island Railroad Co.*, 268 U. S. 633, 45 S. Ct. 612. That case was an action to recover reparations under an order of the Interstate Commerce Commission. The Interstate Commerce Act provided that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues." The claim had not

been filed within that period. There had been passed, however, Section 206 (f) of the Transportation Act which provided:

> "The period of Federal control shall not be computed as part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control."

If this latter Act was operative then the plaintiff's claim was filed in time. The Supreme Court held as follows:

> "Plaintiff's right to file his claim with the Commission had expired several months before the passage of the Transportation Act. But, if the period of Federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the Commission and had no cause of action. It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff. *Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 666, 35 S. Ct. 444, 59 L. Ed. 774; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 642, 38 S. Ct. 408, 62 L. Ed. 914; *Kansas City Southern Ry. v. Wolf*, 261 U. S. 133, 139, 43 S. Ct. 259, 67 L. Ed. 571. On the expiration of the two-year period, it was as if liability had never existed. And this court, applying the rule of construction that all statutes are to be considered prospective unless the language is express to the contrary, or there is a necessary implication to that effect, recently has held that section 206 (f) does not apply to causes of action which were barred by

a state statute of limitations before the passage of the Transportation Act. *Fullerton Co. v. Northern Pacific*, 266 U. S. 435, 437, 45 S. Ct. 143, 69 L. Ed. 367.

Plaintiff suggests that the only period of limitations applicable to claims for reparation is that prescribed by section 16 (2), and argues that, as the period of Federal control exceeded two years, section 206 (f) must be construed retrospectively or given no effect.

We need not re-examine the doctrine of *Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483, as it is plain that case does not apply. That was an action on a contract for the recovery of money. By a state statute of limitations the right of action had been barred. The statute was repealed before the action was commenced. It was held that the action could be maintained, and that such repeal did not deprive the debtor of his property without due process of law in violation of the Fourteenth Amendment. The decision rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (*The Harrisburg*, 119 U. S. 199, 214, 7 S. Ct. 140, 30 L. Ed. 358), and those arising under the Federal Employers' Liability Act, 35 Stat. 65,

c. 149, being Comp. St. Sections 8657-8665 (*Central Vermont Ry. v. White*, 238 U. S. 507, 511, 35 S. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199, 201, 36 S. Ct. 75, 60 L. Ed. 226; *Kannellos v. Great Northern Ry. Co.*, 151 Minn. 157, 160, 186 N. W. 389; *Jones v. D., L. & W. R. R. Co.*, 96 N. J. Law, 197, 114 A. 331). See, also, *Davis v. Mills*, 194 U. S. 451, 454, 24 S. Ct. 692, 48 L. Ed. 1067. This case belongs to the latter class. Section 260 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive respondent of its property without due process of law in contravention of the Fifth Amendment. *Cf. Levy v. Wardell*, 258 U. S. 542, 544, 42 S. Ct. 395, 66 L. Ed. 758; *Forbes Boat Line v. Board of Commissioners*, 258 U. S. 338, 340, 42 S. Ct. 325, 66 L. Ed. 647; *Union Pacific R. R. v. Laramie Stock Yards*, 231 U. S. 190, 200, 34 S. Ct. 101, 58 L. Ed. 179; *Winfree v. Northern Pacific Ry. Co.*, 227 U. S. 296, 301, 33 S. Ct. 273, 57 L. Ed. 518."

CONCLUSION.

To summarize:

1. On April 20, 1926, when payment was exacted from the respondent, not only had the statute of limitations on collection become a bar but the respondent's liability, if any, had been expressly extinguished.

2. When Congress two years later passed an act providing against refunds of taxes paid after the statute of limitations had run, it could not have been intended to affect cases like the present, wherein not only had the statute run but the liability itself had been extinguished. If such had been the intent

it would have been clearly expressed. This construction of the provisions of the act will eliminate constitutional questions from the case.

3. The provisions of the Act of 1928 in question do not in terms undertake to ratify an illegal collection, nor to reimpose an extinguished tax. If these provisions have this effect it is by inference alone and a tax cannot be imposed by inference. If Congress by the Act of 1928 did intend to re-impose an extinguished tax and thus revive a dead liability, the attempt to do so is a violation of the Fifth Amendment and unconstitutional:

(a) Because the reviving of a dead liability is tantamount to the taking of property without due process of law, and

(b) Because Congress did not attempt to revive the liability against all taxpayers alike and accordingly the Act as applied to respondent is so arbitrary and discriminatory as to amount to confiscation of respondent's property, contrary to the Fifth Amendment.

4. The filing of the bond with the claim in abatement did not constitute a waiver of the statute of limitations because:

(a) Admittedly the claim itself did not have such effect

(b) the only purpose of the bond was to insure payment if and when due,

(c) at the time the bond was given no limitation was recognized, and

(d) at the time the bond was given the statute of limitations had already run.

For the reasons above assigned it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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MASCOT OIL COMPANY, INCORPORATED, *v.* UNITED STATES.

UNITED STATES *v.* WYMAN, PARTRIDGE & COMPANY, INCORPORATED.

HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* ERIE COAL & COKE COMPANY.

CERTIORARI TO THE COURT OF CLAIMS AND THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 400, 416, and 508. Argued December 11, 1930.—Decided January 26, 1931.

Section 1106 (a) of the Revenue Act of 1926, provided, *inter alia*, that "The bar of the statute of limitations against the United

States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." *Held* that, whatever its proper construction, the fact that the taxes in question were collected while this section was in force, did not save claims for refunds from § 611 of the Revenue Act of 1928. See *Graham* v. *Goodcell, ante,* p. 409.

42 F. (2d) 309; 70 Ct. Cls. 246, affirmed.

41 F. (2d) 886; 70 Ct. Cls. 119, reversed.

42 F. (2d) 214, reversed.

CERTIORARI (see *post*) to review judgments in suits to recover moneys collected as income and profits taxes. In the first case the Court of Claims denied the claim; in the second it allowed it; and in the third a recovery in the District Court, 33 F. (2d) 135, was affirmed on appeal.

Messrs. Theodore B. Benson and *W. A. Sutherland* argued the cause, and *Mr. Benson* and *Mr. William Meyerhoff* filed a brief, for the Mascot Oil Company, Incorporated.

Mr. Frank J. Albus, with whom *Mr. William Meyerhoff* was on the brief, for Wyman, Partridge & Company.

Mr. Robert A. Applegate, with whom *Mr. H. B. McCawley* was on the brief, for the Erie Coal & Coke Company.

Assistant Attorneys General Rugg and *Youngquist,* with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch, Sewall Key,* and *Norman D. Keller,* Special Assistants to the Attorney General, and *Erwin N. Griswold, George H. Foster, Bradley B. Gilman,* and *H. Brian Holland* were on the briefs, for the United States and Heiner.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

These actions were brought to recover the amount of taxes alleged to have been illegally collected after the

expiration of the statutory period of limitation. The Government resists recovery under section 611 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875). In No. 400, *Mascot Oil Company, Inc.*, v. *United States*, the Government was successful. 42 Fed. (2d) 309. In No. 416, *United States* v. *Wyman, Partridge & Company*, 41 Fed. (2d) 886, and in No. 508, *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, 42 Fed. (2d) 214, the decisions below were in favor of the plaintiffs. This Court granted writs of certiorari.

In No. 400, *Mascot Oil Company, Inc.* v. *United States*, the taxpayer had made a deposit in escrow with a bank to cover the amount of the tax, but, when the collector demanded payment, it was made by the taxpayer under protest and not from the deposit. In No. 508, *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, a bond had been given to secure payment of the tax. The making of the deposit in the former case, and the giving of the bond in the latter, were after the statute of limitations had run, but the taxpayer in each case insists that the statute had not thereby been waived.

We may lay that question aside, for if there was no waiver these two cases, together with No. 416, *United States* v. *Wyman, Partridge & Company*, involved the same circumstances as those decided this day in *Graham* v. *Goodcell, ante*, p. 409, save that collections were made while section 1106 (a) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 113) was in force.[1] That section was repealed,

[1] This section provided: "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

as of the date of its passage, by section 612 of the Revenue Act of 1928 (45 Stat. 875). It is not necessary to attempt to resolve the questions raised by the ambiguous language of this section, as we are of the opinion that, from any point of view, it does not protect the taxpayers from the operation of section 611 of the Revenue Act of 1928. At the time the taxes were collected, there was no liability on the part of the taxpayers, but this was also true in the case of the petitioners in *Graham* v. *Goodcell, supra.* The Congress had constitutional authority in the circumstances set forth in section 611 of the Revenue Act of 1928 to cure the defect in administration which had resulted in the collection of the tax after the statute of limitations had run and to deny recovery to the taxpayers for the amount paid. The fact that section 1106 (a) of the Revenue Act of 1926 was in effect at the time of the collection is a distinction which does not affect the result.

No. 400, *Mascot Oil Company, Inc.,* v. *United States, judgment affirmed.*

No. 416, *United States* v. *Wyman, Partridge & Company, judgment reversed.*

No. 508, *Heiner, Collector of Internal Revenue,* v. *Erie Coal & Coke Company, judgment reversed.*